United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7389

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-7389

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P/S

PATRICIA McREDMOND, et al., by their attorney and next friend, CHARLES SCHINITSKY, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

- against -

MALCOLM WILSON, individually and as Governor of the State of New York, et al.,

Defendants-Appellees.

BRIEF FOR APPELLANTS ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

CHARLES SCHINITSKY, ESQ.
THE LEGAL AID SOCIETY
Attorney for Plaintiffs-Apoellants
Office and P.O. Address
189 Montague Street
Brooklyn, New York 11201

GENE B. MECHANIC, ESQ.
MICHAEL J. DALE, ESQ.
of Counsel

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this civil rights action presents the narrowly limited special circumstances which permit application of the abstention doctrine by a federal district court?

2. Whether the lower court erred by abstaining from exercising jurisdiction over claims which fall under the purview of the three-judge court statute?

STATEMENT OF THE CASE

Plaintiffs-Appellants ("Appellants") appeal from an order entered in McRedmond, et al. v. Wilson, et al., filed in the Southern District of New York on June 27, 1975, in which the

Honorable Lee P. Gagliardi, in accordance with his opinion dated June 23, 1975, abstained from exercising jurisdiction over Appellants' complaint (Docs. 27, 28; A. 223, 225).*

Appellants are youths who have been adjudicated as "persons in need of supervision" ("PINS") by the Family Court of the State of New York.** Invoking jurisdiction under the Civil Rights Act, 28 U.S.C. §1343 and 42 U.S.C. §1983, they instituted this class action on November 12, 1974 (Doc. 1; A. 1), alleging that Appellees, by confining them in state training schools on the basis of their PINS adjudications, deprive them of liberty without treatment in violation of the due process clause of the Fourteenth Amendment and the Eighth Amendment's proscription against cruel and unusual punishment. In addition, Appellants claim that their placement in state training schools is cruel and unusual per se, in violation of the Eighth Amend-

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* Numbers in parentheses preceded by "Doc." refer to Documents contained in Record on Appeal. Numbers preceded by "A." refer to pages of Appendix.

** A PINS is defined as a girl or boy less than sixteen years of age who is truant from school or who is incorrigible, ungovernable, or habitually disobedient and beyond the lawful control of parent or other lawful authority. N.Y. Family Court Act §712(b) (McKinney); A. v. City of New York, 31 N.Y.2d 83 (1972).

ment, as well as violative of their right to equal protection under the law pursuant to the Fourteenth Amendment, and unnecessarily curtails freedom of association under the First Amendment, and their right to travel. Appellants also claim that their training school placement denies them the least restrictive alternative treatment, as required by the due process clause, and violates the New York State Executive Law and Family Court Act.

Appellants seek a declaratory judgment that their constitutional and statutory rights have been violated. They also seek an order preliminarily and permanently enjoining and restraining Appellees from placing or continuing the placement of PINS in the state training schools and from transferring them to alternative facilities which suffer from the conditions about which Appellants complain. More specifically, Appellants seek to have those members of their class requiring out-of-family care transferred to community-based foster homes and other programs of familial character which do in fact provide adequate and appropriate treatment.

On January 8, 1975, the complaint was amended by stipulation to request the convening of a three-judge

court to hear those legal claims which were not related to Appellants' treatment at training school (Doc. 5, 13 [Point VI]; A. 57).

The case was heard below on Appellants' motions for a preliminary injunction (Doc. 10, 12, 20, 21, 23, 25, 26; A. 81, 133, 148, 206) and a class action determination (Doc. 8, 11, 13, 17, 24) and Appellees' motion to dismiss all legal claims in the complaint other than those related to the treatment provided Appellants at training school for want of a substantial constitutional claim (Doc. 6, 9, 13, 18, 31; A. 62, 70). Appellees requested that the Court below abstain from exercising jurisdiction over the treatment-related claims (Doc. 1, ¶¶ 143, 144, 145, 146; A. 51, 52) on the ground that Appellants "also present a substantial issue as to their right to treatment under state law" (Doc. 31, p. 29). Appellees also made a motion for an order staying Appellants' request for production of documents (Doc. 15, 19).

Concluding that it should not decide the pending motions, the lower court applied the abstention doctrine to all of the legal claims and, while retaining jurisdiction, held that the allegations in the complaint were of "a sufficiently serious nature as to warrant

reasonably prompt consideration by an appropriate court." It added, "[s]tate court proceedings should be expeditiously commenced by plaintiffs, and it is the hope of this court that the matter will be heard by the state courts without undue delay." (Doc. 27; A.224).

STATEMENT OF FACTUAL ALLEGATIONS

Appellants have been placed into one of the four state training schools for PINS -- Brookwood, Tryon, Highland, Hudson.

The class which Appellants seek to represent consists of all persons who, based upon a PINS adjudication, are presently placed, are on parole from placement or are subject because of their age and circumstances to placement in the four existing training schools for PINS children. There are now about 450 PINS in placement at the four training schools. All but a very few of the children sent to the training schools are hours away from their friends and family, whether their homes are located in New York City, Buffalo, Rochester, Syracuse or Jamestown.* Because the

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* Brookwood Center is a maximum security institution for PINS and delinquent girls located near Claverack, New York, approximately 115 miles north of New York City, and 35 miles south of Albany. (At the time the complaint was filed some boys were in placement at

(continued)

schools are geographically distant from Appellants' homes and communities, visits from friends, families and other members of the community are costly and difficult.

The training schools, Appellants allege, are large, impersonal institutions located in rural areas which are incapable of supporting a family and community environment. The educational, recreational, medical, psychiatric and psychological components of the program are seriously deficient. The staff is numerically inadequate and virtually untrained. Moreover, the training schools lack individualized, comprehensive plans to provide treatment tailored to each youth's particular needs.

Appellants do not challenge the State's authority to adjudicate them as PINS. Nor do they challenge the validity of their placement in the custody of the Division for Youth. Rather, they challenge the legality

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Brookwood.) Tryon's population is predominantly male and the facility is located approximately 210 miles northwest of New York City and 50 miles northwest of Albany. Highland contains both boys and girls and is located about 100 miles north of New York City and 70 miles south of Albany. Hudson presently only has girls in placement, although some boys were there when the complaint was filed. It is located approximately 120 miles north of New York City and 30 miles south of Albany.

of one alternative available to Appellees; their placement in State Division For Youth's training schools. Under F.C.A. §§ 255, 754 and 756, and pursuant to New York Executive Law §§ 501 et seq. (McKinney), the Family Court and the State Division For Youth, respectively, have many alternative dispositions and placement possibilities at their disposal, including the use of group and foster homes, start centers, youth development centers and halfway houses and family therapy.

NEW YORK STATE STATUTES

Family Court Act

§711. Purpose

The purpose of this article is to provide a due process of law (a) for considering a claim that a person is a juvenile delinquent or a person in need of supervision and (b) for devising an appropriate order of disposition for any person adjudged a juvenile delinquent or in need of supervision.

§756. Placement

(a) For purposes of sections seven hundred fifty-three and seven hundred fifty-four, the court may place the child [PINS or Juvenile Delinquent] in its own home or in the custody of a suitable relative or other suitable private person or a commissioner of social services or an authorized agency including the division for youth pursuant to article nineteen-G of the executive law subject to the orders of the court.

Executive Law [Article 19-G]

§510. State schools in the division; estab-

lishment and control.

1. ...the division shall have the jurisdiction, supervision and control of the state schools in the division....

2. Such institutions shall be known as "schools" and "centers" depending on the type of program provided;

(a) A school is defined as an institution offering a general rehabilitative program;

(b) A center is defined as an institution offering special care and attention to those children placed with the division who, in the judgment of the director of the division, require such specialized care;....

§511. Purpose, admissions

1. The schools and centers shall be for the training, care and rehabilitation of children adjudicated as juvenile delinquents or as persons in need of supervision for their acts or conduct while under the age of sixteen, who are under the age of seventeen at the time of placement. Such institutions may be classified in accordance with program provided or by age or sex of the children.

2. Each school and center is authorized to receive juvenile delinquents or persons in need of supervision placed with the division by the family court pursuant to section seven hundred fifty-six of the family court act.

3. The division shall determine the particular state institution in which a child placed with the division shall be cared for, based upon an evaluation of such child. The division shall also have authority to discharge or release children placed with it and to transfer such children from a school or center to any other school or center or to a youth center, when the interest of such children requires such action; provided that a child transferred to a youth center from a school may be returned to a state school upon a determination by the Di-

rector of the Division For Youth that, for any reason, care and treatment at the center is no longer suitable.

4. The division may suspend admissions of children or of any classes of children based upon classification by sex or age or type of care needed, if suitable care, training or discipline cannot be proveded for any one or more classes of such children. The division shall promptly notify courts and other public officers empowered to place children with the division of any such suspension of admission and of its termination. In such event the court placing any such child shall make suitable provision for his detention and care until such suspension of admission is terminated.

POINT I

SINCE THE NARROWLY LIMITED SPECIAL CIRCUMSTANCES WHICH MAY WARRANT USE OF THE ABSTENTION DOCTRINE ARE NOT PRESENT IN THIS CASE, THE DISTRICT COURT'S DECISION TO ABSTAIN FROM EXERCISING JURISDICTION OVER APPELLANTS' CONSTITUTIONAL CLAIMS WAS TANTAMOUNT TO REQUIRING APPELLANTS TO EXHAUST STATE REMEDIES PRIOR TO FEDERAL LITIGATION AND, THEREFORE, WAS IMPROPER.

In the context of the instant case, abstention is equivalent to an impermissible requirement that appellants exhaust state remedies before litigating a civil rights action. Appellants have been ordered to repair to state court for a determination of whether their deprivation of liberty at state training school is justified in light of their statutory right to treatment. The order, in effect, requires Appellants to litigate the "same claim" in state court as raised in federal court under the federal constitution and, thus, contravenes the purpose of the Civil Rights Act to provide a federal remedy independent of any the state might have. NcNeese v. Board of Education for Comm. Unit School District 187, 373 U.S. 668, 672 (1963).

In Monroe v. Pape, 365 U.S. 167 (1961) the Supreme Court comprehensively analyzed 42 U.S.C. §1983 and con-

cluded at 183:

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.

In McNeese, the Supreme Court reaffirmed, at 671, the principle enunciated in Monroe and held that abstention from hearing racial discrimination claims was improper even though the state constitution and school code outlawed racial segregation.

In both McNeese, supra, at 674, n.6, and Zwickler v. Koota, 389 U.S. 241, 248 (1967), the Supreme Court has cited with approval Judge Murrah's statement in Stapleton v. Mitchell, 60 F.Supp. 51, 55 (D. Kansas, 1945):

> We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.

Without a severe limitation on the use of abstention in civil rights cases, federal courts could, in the name of discretion, circumvent the principle that persons deprived of constitutional rights need not ex-

haust state remedies. See Monroe v. Pape, supra.

Therefore, cases involving vital questions of civil rights are the least likely candidates for abstention. Mayor v. Educational Equality League, 415 U.S. 605, 628 (1974); Zwickler v. Koota, supra, at 247-252; Wright v. McMann, 387 F.2d 519, 525 (2d Cir. 1967); Holmes v. New York City Housing Authority, 398 F.2d 262, 266 (2d Cir. 1968); Martarella v. Kelley, 349 F.Supp. 575, enforced 359 F.Supp. 478 (S.D.N.Y. 1972); Lollis v. New York State Department of Social Services, 322 F.Supp. 473 (S.D.N.Y. 1970).

A.

Narrowly Limited Special Circumstances Not Present

The judicially-created abstention doctrine, first fashioned by the Supreme Court in Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941), may be applied only in "narrowly limited special circumstances." Kusper v. Pontikes, 414 U.S. 51 (1974); Zwickler v. Koota, supra, at 248; Propper v. Clark, 337 U.S. 472, 492 (1949).

> The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception

> to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order of the parties to repair to the state court would clearly serve an important countervailing interest.

County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-189 (1959).

In the case at bar, special circumstances do not exist to permit the lower court to avoid its obligation to adjudicate vital questions of civil rights. An analysis of the relevant precedent unequivocably demonstrates that none of the rationales permitting abstention are present in this case.

Abstention has been employed where (1) unsettled issues of state law (2) controlling the litigation (3) have been susceptible to a construction by a state court which would avoid or modify a constitutional question. Lake Carriers Ass'n. v. MacMullen, 406 U.S. 498, 509 (1972); Askew v. Hargrave, 401 U.S. 476 (1971); Reetz v. Bozanick, 397 U.S. 82 (1970); England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964); Harrison v. N.A.A.C.P., 360 U.S. 167 (1959); Meridan v. Southern Bell T. & T. Co., 358 U.S. 639 (1959);

Martin v. Creasy, 360 U.S. 219 (1959); Spector Motor Company v. McLaughlin, 323 U.S. 101 (1944); Railroad Commission of Texas v. Pullman Co., supra.*

"The doctrine contemplates that deference to state court adjudication only be made where the issue of state law is uncertain," Harman v. Forssenius, 380 U.S. 528, 534 (1965); Kusper v. Pontikes, supra, at 55, and where resolution of the federal claim is dependent upon the interpretation of the unclear state law. Drexler v. Southwest Dubois School Corporation, 504 F. 2d 836, 839 (7th Cir. 1974); McNeese v. Board of Education for Comm. Unit School District 187, supra, at 674; Wright v. McMann, supra, at 525.

Abstention is also inappropriate where the state law is the "same" as, or the counterpart to, the con-

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* The above-cited Supreme Court cases all present the paradigm of the "special circumstances" that may make abstention appropriate. In each one, a challenge was made to the constitutionality of an unclear state statute or regulation which could have been construed in light of a state law, different in nature from the federal claim, so as to avoid a constitutional adjudication. Abstention in such special circumstances could minimize the needless friction with state policies," which was of such concern to Mr. Justice Frankfurter in Railroad Commission of Texas v. Pullman Co., supra, at 400. See Kusper v. Pontikes, supra.

stitutional claim since it would not avoid or modify a constitutional question. Wisconsin v. Constantineau, 400 U.S. 433 (1971); McNeese v. Board of Education for Comm. Unit School District 187, supra; Reid v. Board of Education of City of New York, 453 F.2d 238 (2d Cir. 1971); Drexler v. Southwest Dubois School Corporation, supra; Stephens v. Tielsch, 502 F.2d 1360 (9th Cir. 1974).

As a claim pendent to those claims asserted under the federal Constitution, which include a right to treatment claim under the Fourteenth and Eighth Amendments, Appellants in this case have alleged a right to treatment under state law (Doc. 1, ¶148; A. 53), and Appellees have conceded that "the New York Court of Appeals has unequivocably held that such a right exists." Matter of Lavette M., 35 N.Y.2d 135, 141-143 (1974); Matter of Ellery C., 32 N.Y.2d 588, 591 (1973). (Doc. 31, p. 30).

The district court agreed that in Lavette M., the State Court of Appeals "reaffirmed the existence of the statutory right to treatment" and defined the "perimeters of that right." (Doc. 27; A. 219). The lower court then decided that Appellants must assert their statutory right to treatment in state court prior to

litigating their substantial constitutional rights in federal court. Such holding was in error.

First, resolution of Appellants' constitutional claims is in no way dependent upon their statutory right to treatment. The federal rights alleged are "plainly federal in origin and nature," McNeese v. Board of Education for Comm. Unit School District 187, supra, at 674, and arise from the deprivation of liberty inherent in state training school placement. They concern denial of Appellants' constitutional right to treatment in light of due process and the proscription against cruel and unusual punishment. They further concern denial of Appellants' rights to equal protection, free travel and association and freedom from cruel and unusual punishment per se.

These substantial federal questions which the lower court found "to be of a sufficiently serious nature as to warrant reasonable prompt consideration," (Doc. 27; A. 224) are not "in any way entangled in a skein of state law that must be untangled before the federal case can proceed." McNeese v. Board of Education for Comm. Unit School District 187, supra, at 674; Wright v. McMann, supra, at 525. Accord, Drexler v. Southwest Dubois School Corporation, supra, at 839, 841.

The lower court's dissertation on state statutes and regulations concerning PINS to support its erroneous conclusion that a material and complex statutory scheme exists in this case is misleading (Doc. 27; A. 222, 223). The cited sections of the Family Court Act (§§712(b), 732, 742, 743, 754 and 756) have nothing to do with the treatment which PINS receive and the conditions to which they are subjected following their disposition.

The court referred to §501(b) of the Executive Law, which authorizes D.F.Y. to operate and maintain state training schools for PINS. The statute hardly forms a complex statutory scheme, nor are Appellants' treatment claims dependent upon such statute in any way.

The lower court lastly referred to state regulations, 9A N.Y.C.R.R. Part 168, 169, 171. They merely concern discipline of children, duties of the board of visitors, reporting to counsel's office, D.F.Y. records, parole revocation procedures, and a bill of rights for juveniles. These are the only regulations which relate to children placed with D.F.Y. They are neither complex nor can they be interpreted to avoid or modify the federal constitutional questions presented below. See Procunier v. Martinez, 416 U.S. 296, 301 (1974).

Second, the state law, based upon which the district court stayed the exercise of its jurisdiction, is not unclear. See Harman v. Forssenius, supra; Kusper v. Pontikes, supra. The lower court and both parties to the proceeding agree that Appellants have a statutory right to treatment. Hence, the only issue remaining for decision under state law is the purely factual question of whether Appellants' legal right is being violated. See, e.g., County of Allegheny v. Frank Mashuda Company, supra, at 190.

Although the New York Court of Appeals reaffirmed Appellants' statutory right to treatment in Lavette M., supra, it held that:

> On the total record before us, we cannot assume that the necessary initiatives to establish a fully adequate program of supervision and treatment for PINS children, already begun, will not be carried to fruition....A different question will be presented if at a later time it appears that it has not.

35 N.Y.2d at 141.*

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* The Lavette M. opinion was based upon the appeals of two PINS children from Family Court orders placing them in state training schools. The appeals were primarily based upon the argument that the placement of PINS in training school was unlawful per se under the State Court of Appeals decision in Ellery C., supra. The Court held that it was not unlawful per se, supra, at 140.

The lower court, misconstruing the question left unanswered in Lavette M. to be a matter of statutory construction, has in fact asked Appellants to present to the state courts questions which are explicitly factual. For example, on page 11 of its opinion, the district court said:

> As noted earlier, the case law concerning the statutory right to treatment has been evolving to the point where the New York Court has indicated a willingness to fully define the statutory right to treatment in an appropriate case. See Matter of Lavette M., supra; Matter of Ellery C., supra. In its last opinion on the subject, the New York Court expressly left open for future determination the question of whether the training schools have established a "fully adequate program of supervision and treatment for PINS...." Matter of Lavette M., supra, 35 N.Y.2d at 151 ...." [emphasis supplied.] (Doc. 27; A.223.)

On page 8 of its opinion, the lower court again confuses the need to construe a state law with the need to determine whether factual allegations are **true:**

> ...plaintiffs allege that a prerequisite for providing "adequate and appropriate treatment" is "a family environment which fosters intimacy, respect and trust," and that "because of the training schools' geographic isolation, plaintiffs are not able even to have consistent contact with any families." Complaint, Paragraph 49. If this allegation were to be sustained by a

> state court construing state law, a determination by this Court on plaintiffs' claim that the placement of PINS in training schools geographically distant from their families constitutes cruel and unusual punishment in violation of the eighth amendment of the federal constitution would become unnecessary. (Doc. 27; A. 220)

Such questions are clearly factual and must be resolved by evidence, particularly expert testimony. Indeed, other federal courts have treated the same questions in this manner.

For example, in Nelson v. Heyne, 491 F.2d 352 (7th Cir. 1974), cert. denied, 417 U.S. 976 (1974), the Fifth Circuit not only upheld the district court's position that juveniles who were in placement at a state correctional institution for boys were entitled to rehabilitative treatment under both the Fourteenth Amendment due process clause and the Indiana Juvenile Court Act, but properly placed questions concerning the adequacy of treatment in a factual context to be resolved by the district court based upon expert testimony, 491 F.2d at 360.

Likewise, in Morales v. Turman, 383 F.Supp. 53, 71 (E.D.Texas 1974), the district court issued a comprehensive list of the treatment to which institution-

alized youths were entitled pursuant to both the federal constitution and a Texas state statute which mandates "a program of constructive training aimed at rehabilitation and reestablishment in society of children adjudged to be delinquent." As a reading of Judge Justice's opinion will demonstrate, such treatment findings were based upon the evidence given by expert witnesses. See also other cases in which federal courts have discussed the right to treatment, pp. 25 to 27, infra.*

Third, the lower court erred because the law upon which abstention was based is, in effect, the "same" as Appellants' constitutional right to treatment claim. See Wisconsin v. Constantineau, supra; McNeese v. Board

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* The District Court has discretion to decide whether to exercise its constitutional jurisdiction over the pendent state claim, Edelman v. Jordan, 415 U.S. 651 (1974); United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966), and it may even grant adequate relief under the statutory claim without answering the constitutional claims in order to avoid a constitutional ruling, Rosado v. Wyman, 397 U.S. 397, 402 (1970). But its failure to exercise jurisdiction over all the constitutional and statutory claims on the ground that relief may be available in state court under a state statute which is not uncertain is a misapplication of the abstention doctrine.

Appellants submit that since the federal and state claims derive from a common nucleus of operative fact, and Appellants' claims are such that they would ordinarily be expected to try them all in one judicial proceeding, the lower court here should exercise pendent jurisdiction over their statutory right to treatment. United Mine Workers, supra, at 725.

of Education for Comm. Unit School District 187, supra; Reid v. Board of Education of City of New York, supra; Drexler v. Southwest Dubois School Corporation, supra; Stephens v. Tielsch, supra.

Appellants claim that the failure and inability of the training schools to provide them with "adequate and appropriate treatment" violates their rights under the federal Constitution (Doc. 1, ¶¶143, 144, 145; A. 51, 52) and that the failure and inability of such institutions to provide them with "adequate and appropriate training, care and rehabilitation" violates their rights under the New York Executive Law and the Family Court Act (Doc. 1, ¶148; A. 53). Such claims present legally and factually indistinguishable rights. Under §511(1) of the Executive Law, training schools "shall be for training, care and rehabilitation." Such terms are elements of the concept of treatment*, and the New York Court of Appeals has concluded that Appellants have a statutory "right to treatment." Lavette M., supra; Ellery C., supra.

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* In Nelson v. Heyne, supra, at 360 n. 12, the court held that "a right to treatment in this case has a statutory basis in view of the 'custody, care and discipline' language of the Indiana Juvenile Court Act...." See also Morales v. Turman, supra, at 71.

This is not a case where there are controlling issues which are not the counterpart to a federal claim. See, e.g. Raetz v. Bozanich, supra; Meridan v. Southern Bell T. & T. Co., supra; see also Stephens v. Tielsch, supra, at 1361, but rather one where the state right has been developed in accordance with the federal right. In Lavette M., the State Court of Appeals defined the perimeters of the statutory right to treatment to comply with due process and cited federal court cases in support:

> There must be a bona fide effort to adequately treat the child in need of supervision in the light of present knowledge. Where the State, as parens patriae, involuntarily places a PINS child in a training school, it is for the purpose of individualized treatment and not mere custodial care. Whatever the altruistic theory for depriving the child of his liberty, if proper and necessary treatment is not forthcoming, a serious question of due process is raised. (See Rouse v. Cameron, 125 U.S.App.D.C. 366, 373 F.2d 451; Wyatt v. Stickney, D.C. 325 F.Supp. 781, 785.) Nor can the failure to provide suitable and adequate treatment be justified by lack of staff or facilities. (Cf. Matter of Kesselbrenner v. Anonymous, 33 N.Y.2d 161, 350 N.Y.S.2d 889, 305 N.E.2d 903; see also, Rouse v. Cameron, supra, 373 F.2d at pp. 457-458.) Thus, it is also that the right to treatment embraces a requirement of initial diagnosis and of periodic assessment of the PINS child's needs in order that

> individualized treatment may be revised as the diagnoses develops. Beyond this, we need not go at this time. [Emphasis supplied.]

35 N.Y.2d at 142.

Moreover, §711 of the Family Court Act states, inter alia, the "purpose of this article is to provide a due process of law...for devising an appropriate order of disposition for a [PINS]." (Emphasis supplied.)

In Drexler v. Southwest Dubois School Corp., the circuit court reviewed the district court's abstention from hearing a teacher's claim that she was fired both arbitrarily and for exercising First Amendment rights, in violation of due process. The lower court had found that a decision under a state statute which prohibited arbitrary governmental action might eliminate the need for a federal constitutional determination. In rehearing the appeal, en banc, the Seventh Circuit reversed, stating:

> [G]iven the broad and generalized nature of the concept of arbitrary governmental action, it is possible that in many section 1983 actions the alleged constitutional deprivations might be found to be a violation of state law if only a plaintiff would present the claim to a state court. Some small amount of federal-state friction might be eliminated by such a requirement. However, if elimination of federal-

> state friction were the only criterion, a plaintiff should also be required to submit his federal constitutional claim to the state courts in the first instance. Indeed, in this case one of the constitutional issues raised is the question of arbitrary and capricious action. We find that ordering plaintiff to litigate the question of "arbitrary action" in the state courts before either of these constitutional issues will be considered is, in effect, requiring him to first litigate the "same claim" in the state courts. Such exhaustion is not necessary in a section 1983 action.

504 .2d at 839.

Furthermore, the lower court herein inexplicably found that a federal constitutional determination at this time "would needlessly thrust the federal courts into a particularly sensitive and complex area of state regulation" (Doc. 27; A. 224). Even assuming that the other prerequisites are present, abstention remains improper unless a constitutional adjudication would "touch a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." Canton v. Spokane School District #81, 498 F.2d 840, 845 (9th Cir. 1974); see Railroad Commission of Texas v. Pullman Co., supra, at 498. However, federal courts not only have been routinely hearing §1983 actions which challenge the treat-

ment of juveniles in state institutions, but have enforced a right to treatment under the federal constitution. Nelson v. Heyne, supra; Martarella v. Kelley, supra; Lollis v. New York State Dept. of Social Services, supra; Morales v. Turman, supra; Inmates of Boys' Training School v. Affleck, 346 F.Supp. 1354 (D.R.I. 1972). In fact, research has disclosed no case in which a federal court has abstained from hearing a right to treatment claim.*

In Martarella, supra, at p. 593, a case involving the treatment of PINS who were confined in a New York City Department of Social Services' secure detention facility, Judge Lasker cited Wright v. McMann, supra,

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* Federal Courts have been also quite willing to adjudicate the treatment rights of mental patients who are confined in state institutions. See, e.g., Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); New York State Assn. of Retarded Children, Inc. v. Rockefeller, 357 F.Supp. 752, 757 (E.D.N.Y. 1973); Welsh v. Litkins, 373 F.Supp. 487 (D.Minn. 1974); Dixon v. Attorney General of Commonwealth of Pennsylvania, 325 F.Supp. 966 (M.D. Pa. 1971). In O'Connor v. Donaldson, ____U.S.____,43LW4929 (1975), the Supreme Court upheld the Fifth Circuit's decision in Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), which had cited the above juvenile treatment cases for support, that the involuntary confinement of a non-dangerous mental patient without treatment was unconstitutional. Moreover, in Wyatt v. Aderholt, supra, that same circuit affirmed the district court's order which set forth in detail the treatment to which mental patients in Alabama State Hospitals were entitled under the federal constitution. See Wyatt v. Stickney, supra.

and held that a federal court should not abstain from deciding the "constitutionality of conditions of confinement."* Previously, in Lollis, supra, at 479, Judge Lasker found abstention improper where a PINS girl who was confined at Brookwood Center alleged that her isolation in a stripped room for two weeks was cruel and unusual punishment.

Similarly, in Inmates of Boys' Training School v. Affleck, supra, at 1358, the Court found that the law-

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* Martarella is the only treatment case which the lower court discussed. Unable to distinguish it from the instant case, the court inferred that abstention would have been a proper course for Judge Lasker because one year after he decided that the equal protection clause was not violated because PINS were placed in temporary detention facilities with delinquents while neglected children were not, the State Court of Appeals, in Ellery C., supra, held that PINS could not be commingled with delinquents in state training schools. The lower court here confused the training school with the temporary facility in concluding, "[h]ad the Martarella court abstained, the decision under state law in Ellery C. would have obviated the necessity of a federal constitutional determination." (Doc. 27; A. 221).

Ellery C. did not concern any of the facilities dealt with in Martarella, and in any event, a decision on mere commingling could not possibly affect questions concerning whether a placement itself is unconstitutional. Moreover, the lower court did not suggest what Judge Lasker should have done with the right to treatment claims under the Eighth and Fourteenth Amendments. Most importantly, the lower court's reasoning illustrates its failure to distinguish between the principles of abstention and exhaustion.

suit went "to the conditions of confinement of juveniles and, as such, [was] well within the jurisdiction of the federal courts," and also held that there was not "any justification in precedent to apply the abstention doctrine...."

In addition, federal district courts have been regularly evaluating the adequacy of treatment in light of the least restrictive treatment alternative, another of Appellants' due process claims from which the lower court has abstained. See Morales v. Turman, supra, at 124; Wyatt v. Stickney, supra, at 396; Covington v. Harris, 419 F.2d 617 (D.C. Cir. 1969); see also Cudnik v. Kreiger, 392 F.Supp. 305, 308-311 (N.D. Ohio 1974).

Rather than following the substantial precedent established by the federal courts in adjudicating treatment rights of both juveniles and mental patients deprived of their liberty by the state, the lower court relied almost entirely upon the Second Circuit's decision in Reid v. Board of Education of the City of New York, supra. In Reid, which concerned the alleged failure of the Board of Education to place brain-injured children expeditiously in appropriate special education classes, the Court of Appeals affirmed the lower court's decision to abstain because of "special circumstances"

not present here.

In Reid, the Court concluded, at 244, that the plaintiff-appellants had substantial state statutory and constitutional claims which were "separate and distinct from the rights asserted as a basis for [the appellants'] federal claims." The state statute in that case set forth the type of classes required for brain-injured children and the procedures to be followed to place children in such classes, and the state constitution established "a system of free common schools, wherein all the children of this state may be educated."* There were no counterparts to such state law under the federal constitution, and in contrast to the instant case, the state courts had never interpreted the state law involved in Reid on the basis of a federal right. See page 23, ante.**

Moreover, in Reid, the Court of Appeals agreed

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* As opposed to Reid, placement procedures in this case are not at issue.

** Education is not among rights afforded explicit or implicit protection under the federal constitution. San Antonio Independent School District v. Rodriguez, 411 U.S.1, 35 (1973). On the other hand, the right not to be civilly confined without treatment is well protected under the federal constitution. O'Connor v. Donaldson, supra; see also pp. 25 to 27, ante.

that "the existence of state claims will not itself justify abstention," supra, at 242. The Court then took cognizance of the fact that unclear and complex state education statutes and regulations as well as constitutional provisions, existed with regard to the Board's obligation to place the school children in special education classes and with regard to the particular programs which the Board was obligated to institute. Contrary to Reid, this case has no unclear or complex issue of state law (pp. 17-18, ante). See, Nickerson v. Thomson, 504 F.2d 813 (7th Cir. 1974) [where the court reversed the district court's order abstaining from hearing a special education case presenting circumstances comparable to Reid]; Pennsylvania Ass'n. of Retarded Children v. Commonwealth of Pennsylvania, 343 F.Supp. 279, 298-300 (E.D.Pa. 1972).

This case also differs from Reid because appellants in Reid were at home, awaiting placement in special classes while the Appellants here are confined in state institutions and suffering mental and physical abuse. See New York Ass'n. for Retarded Children, Inc. v. Rockefeller, supra.

In addition, the lower court in this case failed to consider that a state remedy was readily available

in Reid. The Reid class was able to successfully petition the State Commissioner of Education for the relief sought in the federal suit, through the explicit administrative review procedures set forth in state statute and regulations. See New York Education Law §310 (McKinney) and Matter of Reid, Education Dept. Decision No. 8742 (11/26/73). Appellants here, however, not only have no administrative remedy, but may very well have no judicial remedy. See Point I B, infra.

B.

Lack Of "Plain, Adequate And Complete" State Remedy

In addition to the aforementioned preconditions for abstention, a federal court may abstain from deciding a case only if there exists a "plain, adequate and complete" remedy in the state courts. Holmes v. New York City Housing Authority, supra; Monroe v. Pape, supra, at 477. This remedy, the Supreme Court has held, while adequate in theory, must also be available in practice. Askew v. Hargrave, 401 U.S. 476, 478 (1971); Monroe v. Pape, supra, at 174.

Commencing with Railroad Commission of Texas v. Pullman Co., supra, at 645, the Supreme Court has regularly analyzed the adequacy of the state remedy prior

to deciding whether abstention was appropriate. In fact, on several occasions the Court has even spelled out the state court remedy. Harrison v. N.A.A.C.P., supra, at 173 (Virginia declaratory judgment procedure, 2 Va. Code, 1950 §§8-578 to 8-583, held adequate); McNeese v. Board of Education for Comm. Unit School District 187, supra, at 675 (§22-19 of the Illinois School Code held to be an inadequate remedy.) Lower federal courts have routinely looked to the availability of an adequate remedy. Neal v. Brim, 506 F.2d 6, 10 (5th Cir. 1975) (extraordinary writs against judges. Tex.Rev.Civ. Stat.Ann.Art. 1733, held adequate); Wright v. McMann, supra, at pp. 523-524 (Article 78 proceeding challenging prison conditions held inadequate); New York Ass'n. for Retarded Children v. Rockefeller, supra, at 767 (Article 78 held inadequate).*

This Court has emphasized the importance of determining that an adequate state remedy is reasonably certain before applying the abstention doctrine. In a prisoner's civil rights action, it said:

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* Of course, as pointed out in Point I, infra, the availability of a state court remedy can not be used to require Appellants to exhaust state judicial remedies before commencing a civil rights action. Monroe v. Pape, supra, at 81; Canton v. Spokane School District #81, supra, at 844.

> Indeed, the objectives of the Civil Rights Act would be defeated if we decided that this federal claim grounded on alleged violation of the federal Constitution would have to stagnate in the federal court until some nebulous or nonexistent remedy was pursued like a will-o'-the-wisp in the state court.

Wright v. McMann, supra, at 525.

Appellees' argument in the court below that Appellants could commence a suit for declaratory judgment in the state courts fails to recognize the unique restrictions on litigating in other state courts matters which have arisen from Family Court proceedings.

First, the Family Court has exclusive original jurisdiction over any proceeding involving a PINS, F.C.A. §713, and therefore, Appellants' ability to litigate questions concerning their treatment while in Division for Youth custody in State Supreme Court is quite uncertain. The State Supreme Court, Kings County, has recently dismissed a petition of a "neglected" child in the custody of the Department of Social Services who sought appropriate long-term care and treatment. The Court held that because under §1013(a) of the Family Court Act, "the family court has exclusive original jurisdiction over proceedings" concerning the abuse or neglect of a child, "it was the intention of the legis-

lature...that every aspect of a proceeding relating to a neglected child is to be heard in the Family Court." In the Matter of the Application of Michael J. Dale v. James R. Dumpson, Index No. 14692/74 (Spec.Tm., Part I, Sup.Ct., Kings Co., 1/21/75) (Doc. 9; A. 76). The case was then affirmed without opinion by the New York Appellate Division, Second Department. Matter of Dale v. Dumpson, N.Y.L.J. 7/2/75, p. 13, col. 8.

Moreover, even though Appellants may be denied access to the State Supreme Court, they will not be able to receive declaratory relief in the Family Court which lacks the power to issue a declaratory judgment. Loomis v. Loomis, 262 A.D. 906 (2d Dept. 1941), rev'd on other grounds, 288 N.Y. 222; Carbone v. Carbone, 166 Misc. 924 (Dom.Rel.Ct., Fam.Ct.Div., Bronx Co., 1938). Hence, Appellants may be precluded from receiving any declaratory relief in state court, or in any event, will be subjected to extensive litigation to decide whether they have standing to seek a declaratory judgment.*

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* Appellants note that should they be allowed to litigate their claims in State Supreme Court, abstention here could not result in the federal court's deference to a state court which would more authoritatively construe state law, since the Supreme Court has never litigated questions relating to the treatment of PINS.

Second, although an individual PINS may have a hearing in Family Court to determine whether adequate treatment and supervision is being provided, Lavette M., supra, resolution of such case would not dispose of the class issues alleged below. Additionally, at least one Family Court has held that it did not have the power to order the Division for Youth to provide treatment. In the Matter of Kevin M., D. 13716/73 (Fam.Ct., Kings Co. 1/3/75) (Doc. 9; A. 77); rev'd. on other grounds, N.Y.L.J. 6/19/75, p. 2, col. 2 (1st Dept.).

Another Family Court refused to grant a new dispositional hearing to determine whether a PINS child had been afforded adequate and appropriate treatment. Matter of Gaylor A., (Fam.Ct., Richmond Co.) Dkt. No. S-349/74, dec. dated 5/12/75. (A copy of the decision is annexed to this brief.)

C.

Unreasonable Hardships Will Result From Abstention.

Most importantly, Appellants allege extraordinary and exceptional circumstances which warrant the Court's attention. Appellants are children who are being deprived of their most fundamental right - liberty. For

each day that the issues here remain unresolved, Appellants will be confined for twenty-four hours in geographically isolated state institutions for "persons in need of supervision."

In support of their motion for a preliminary injunction in the court below, Appellants submitted the affidavits of Augustus Kinzel, M.D., associate in Psychiatry at the College of Physicians and Surgeons at Columbia University; Dr. Esther Rothman, a New York State certified psychologist and Principal of a special New York City public school for emotionally disturbed and aggressive and socially maladjusted girls; Sylvia Hoenig, M.S.W., a Counselor at Hudson State Training School; Dr. Gerald Tolchin, a professor and certified psychologist; and the named plaintiffs (Doc. 10, 20, 26; A. 83-112, 133-145, 206-212). Their affidavits and the exhibits submitted therewith (A. 118-132, 146-147) demonstrate the severity and imminence of the injury to Appellants. The experts' conclusions that Appellants are not receiving adequate and appropriate treatment were not effectively rebutted by Appellees (Doc. 21, 23; A. 148-195, 201-205).

Specifically, the medical, hygienic, nutritional, psychogolical, psychiatric, educational and recreation-

al care is inadequate and at times even non-existent. Appellants are subjected to solitary and group confinement, and homosexuality is prevalent. In sum, the status quo at the training schools constitutes immediate irreparable injury to Appellants and forecloses any chance they might otherwise have to develop positively.

Appellants, children who have not been found to have committed a crime, allege conditions which are no less extraordinary and exceptional than adult prisoners who only allege physical abuse, which is reason alone for a federal court to refuse to abstain. See Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12, 20 (2d Cir. 1971).

Moreover, the lower court specifically noted the serious nature of the claims raised (Doc. 27; A. 224). "The nature of the right involved has always been of paramount concern in determining whether abstention is appropriate." DeSalvo v. Codd, 386 F.Supp. 1293, 1297 n.4 (S.D.N.Y. 1974). See, Zwickler v. Koota, supra; Dempsey v. McQueen, 387 F.Supp. 333, 339 (D.R.I. 1975).

The Supreme Court has also evaluated the effect that abstention has on the parties who have been ordered out of federal court. "It exacts a severe penalty from citizens for their attempt to exercise rights

of access to the federal courts granted them by Congress to deny them the elements of justice. Forsyth v. City of Hammond, 166 U.S. 506, 513, 17 S.Ct. 665, 668, 41 L.Ed. 1095." County of Allegheny v. Frank Mashuda Co., supra, at 1067.

Abstention inevitably gives rise to expense and delay. England v. Louisiana State Board of Medical Examiners, supra, at 418; Lake Carriers Ass'n. v. MacMullen, supra, at 509. Appellants have already contributed months of time and effort to this action. They would be forced, if this Court affirmed abstention, to expend the time and money to prepare and submit a new complaint to the state court and duplicate the work which has gone into preliminary injunction and class action motions.*

Furthermore, under the New York Civil Practice Laws and Rules §505, the suit would have to be tried in Albany, Ulster, Columbia or Fulton Counties, an unnecessary inconvenience to both Appellants' and Appellees' attorneys.**

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* This is not a case where a state court proceeding concerning the same issues as raised in the federal case is already pending. See Askew v. Hargrave, supra. Additionally, federal-state comity has "little force in the absence of a pending state proceeding." Lake Carriers Ass'n., supra, at 509; Alsager v. District Court of Polk County, Iowa, 75-1063 (8th Cir. June 17, 1975).

** This assumes, of course, that Appellants would be able to sue in State Supreme Court, which, as of now, it appears they cannot, infra, at 33ff.

Appellants submit that the hardships that they would be forced to overcome if this Court were to uphold abstention would be far greater than that envisaged as inevitable by the Supreme Court when it sought in Pullman, supra, to protect federal-state relations.

POINT II

THE LOWER COURT'S DECISION TO ABSTAIN FROM HEARING APPELLANTS' PER SE CONSTITUTIONAL CHALLENGES TO THE STATE STATUTORY SCHEME PERMITTING THEIR PLACEMENT IN TRAINING SCHOOLS FOR THE PURPOSE OF TREATMENT, WAS IN ERROR SINCE, WHERE LEGAL CLAIMS FALL WITHIN THE CONTOURS OF THE THREE-JUDGE COURT STATUTE, ONLY A THREE-JUDGE COURT CAN ABSTAIN FROM EXERCISING JURISDICTION OVER SUCH CLAIMS.

In the stipulation and order amending their complaint (Doc. 5; A. 57), Appellants requested that the Court below convene a three-judge district court pursuant to 28 U.S.C. §§2281 and 2284. However, as Appellants stated to the lower court in Point VI of their memorandum of law in opposition to Appellees' motion to dismiss (Doc. 13), such request did not apply to those claims which involve Appellants' right to treatment.* On the

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* Appellants' treatment claims do not challenge the constitutionality of state statutes authorizing placement
(Continued)

other hand, Appellants challenge per se the state statutes which permit the placement of PINS in the training schools for treatment (F.C.A. §756, Executive Law §§ 501(e), 510 and 511) on the grounds that regardless of whether the children receive treatment, such placements amount to cruel and unusual punishment, denial of equal protection and undue restriction on freedom to associate and to travel. These per se claims fall under the umbrella of the three-judge court statute, and hence, a single district judge cannot abstain from hearing them.

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of PINS in "schools" and "centers" for treatment purposes, but rather seek to enforce the constitutional and state statutory right to be placed only in schools and centers which, in fact, provide treatment. Therefore, a three-judge court need not be convened. Morales v. Turman, supra, at 60-64. A single federal district court judge has power to dispose of claims that an otherwise constitutional state statute or regulation is being administered in an unconstitutional manner. Phillips v. United States, 312 U.S. 246, 251-253 (1941); Ex Parte Bransford, 310 U.S. 354, 361 (1940); Johnson v. Harder, 438 F.2d 7, 13 (2d Cir. 1971); Astro Cinema Corp. v. Mackell, 422 F.2d 293, 297 (2d Cir. 1970). Furthermore, because the least restrictive alternative principle is "inherent in the very nature of civil commitment," Covington v. Harris, supra, at 623, a three-judge court need not be convened to decide this issue either. The right to a least restrictive treatment is inexorably intertwined with the right to treatment. Morales v. Turman, supra, at 124.

Idlewild Bon Boyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962).*

Although a single district judge may dismiss insubstantial federal claims which purport to necessitate the convening of a three-judge court, Idlewild Bon Voyage Liquor Corp., supra, such course would have been improper here since Appellants' legal challenges to the statutes permitting training school placement present substantial federal questions.**

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* Appellants claim that placement in state training schools which are distant from Appellants' families, friends and communities based solely upon PINS adjudications, constitutes cruel and unusual punishment, that their equal protection rights are violated because there is neither a compelling state interest nor a rational basis for placing PINS and not abused or neglected children in training schools, and that placement in training schools violates Appellants' constitutional rights to freedom of travel and association. The merits of these claims are discussed infra. Moreover, it is noteworthy that, although Appellees made a motion to dismiss these claims for want of substantial federal questions in the lower court, they limited their abstention request to Appellants' right to treatment and least restrictive alternative claims (Doc. 31).

** It must be inferred that the lower court would not have reached the abstention question unless it believed these challenges to constitute substantial federal claims. Significantly, the district court found Appellants' allegations, without limitation, "to be of a sufficiently serious nature to warrant reasonably prompt consideration." (Doc. 27, ¶12; A. 224.)

A.

Cruel and Unusual Punishment

Since Appellants have merely been found to be children "in need of supervision," not juvenile delinquents, and have been so adjudicated without receiving the full due process safeguards afforded to a criminal defendant, the only possible constitutional justification for deprivation of their liberty is to provide adequate treatment, not to inflict punishment or retribution. In re Gault, 387 U.S. 1, 15, 22 n.30 (1967); McKeiver v. Pennsylvania, 403 U.S. 528, 553 (1971); Nelson v. Heyne, supra; Martarella v. Kelley, supra; Morales v. Turman, supra; see also O'Connor v. Donaldson, supra.

Hence, any restrictions on their liberty which are not essential for treatment can only be defined as unnecessarily "punitive" and by their very nature "cruel and unusual punishment." See Hamilton v. Love, 328 F. Supp. 1182, 1193 (E.D.Ark. 1971); Vann v. Scott, 467 F.2d 1235, 1239-1240 (7th Cir. 1972); see also Robinson v. California, 370 U.S. 660, 616-667 (1962); Moctezuma v. Malcolm, Nos. 74-2427, 74-2482, slip. op. 5279 (2d Cir. 7/31/75); Rhem v. Malcolm, 507 F.2d 333,

336-337 (2d Cir. 1974); Cudnick v. Kreiger, supra, at 311.*

Appellants submit that their placement in state training schools constitutes "cruel and unusual punishment" because even assuming that they are receiving adequate treatment, their confinement in institutions which are geographically isolated hundreds of miles from their families, friends and communities is a restriction on their liberty which is not essential for treatment. Such isolation can be considered as serving none other than a punitive purpose.

Because Appellants' placement in state training

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* Federal courts have held that the Eighth Amendment's proscription against cruel and unusual punishment is applicable to both juveniles and mental patients who are confined for rehabilitative purposes only. Nelson v. Heyne, supra; Martarella v. Kelley, supra; Lollis v. N.Y.S. Dept. of Social Services, supra; Inmates of Boys' Training School v. Affleck, supra; Morales v. Turman, supra; Vann v. Scott, supra; Knecht v. Gillman, 488 F.2d 1136 (8th Cir. 1973) [mental patients]; Welsch v. Litkins, supra [mental patients]. On the other hand, the Second Circuit has held that restrictions placed upon pre-trial detainees, when unnecessary for confinement alone, may constitute "cruel and unusual punishment" in violation of the due process and equal protection clauses of the Fourteenth Amendment. Moctezuma v. Malcolm, supra; Rhem v. Malcolm, supra.

A determination of which constitutional amendment applies here is not as significant as the enforcement of the mandate that "...persons residing in state institutions other than prisons may not be constitutionally 'punished' (Robinson v. California, supra)." New York State Ass'n. of Retarded Children v. Rockefeller, supra, at 764.

schools has unreasonably separated them from their families, communities and friends, such confinement amounts to an undue hardship and loss or penalty. Most of these children come from families whose financial resources are severely limited. In fact, many are receiving public assistance, and it is virtually impossible for these families to afford the cost of periodic transportation to and from the schools. Appellants are even forced to pay the costs for their infrequent home visits.* (Doc. 9; A. 71).

It is irrelevant that the statutory scheme involved is non-penal in nature. Knecht v. Gillman, supra. Activity labeled rehabilitation or treatment may still constitute cruel and unusual punishment. Vann v. Scott, supra; Martarella v. Kelley, supra. The court in Inmates of Boys' Training School v. Affleck, supra, stated

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* That a very few children may live relatively near the institution in which they are placed neither resolves the constitutional violation suffered by the preponderance who do not live near it, nor vitiates the right to relief pursuant to Fed.R.Civ.P. 23, by members of the class who are aggrieved. CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968). Not only are PINS from New York City who are in training school placement distant from their homes, but those from Buffalo, Rochester, Syracuse, Binghamton, Jamestown, Yonkers, Utica and nearly all other cities in New York State who are in those institutions are at least as far and most often further from their homes.

at p. 1366:

> The fact that juveniles are in theory not punished but merely confined for rehabilitative purposes, does not preclude operation of the Eighth Amendment.

Since there exists no "compelling need" to "punish" children by placing them in institutions which are distant from their homes, the state mandate for such restriction must be declared constitutionally invalid. See Moctezuma v. Malcolm, supra, at 5288; Rhem v. Malcolm, supra; Hamilton v. Love, supra.

Furthermore, assuming arguendo only, that distant geographic separation from home is a compelling treatment need for PINS children, Appellants submit that such deprivation nevertheless constitutes cruel and unusual punishment.*

Although the cruel and unusual punishment clause of the Eighth Amendment "is not susceptible to precise definition," the courts have applied four principles when determining whether a violation of the guarantee against cruel and unusual punishment has occurred. Furman v. Georgia, 408 U.S. 238, 269 (1972) (concurring

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* As previously stated, the Eighth Amendment guarantee against cruel and unusual punishment has been held to prohibit conditions to which "juvenile delinquents" and PINS are subjected.

opinion of Mr. Justice Brennan).

First, the punishment cannot be so severe as to be "degrading to the dignity of human beings." Furman v. Georgia, supra, at 274; Weems v. U.S., 217 U.S. 349 (1910). Second, inherent in the Eighth Amendment is the requirement that there be no arbitrary infliction of severe punishment. Furman v. Georgia, supra, at 274; Williamson v. Utah, 99 U.S. 130 (1878). Third, the severe punishment must not be unacceptable to contemporary society as viewed pursuant to objective criteria. Furman v. Georgia, supra, at 277-278; Weems v. U.S., supra, at 380; Trop v. Dulles, 356 U.S. 86, 102-103 (1958). Fourth, the severe punishment may not be excessive under this principle if it is unnecessary. Furman v. Georgia, supra, at 279; Robinson v. California, supra.

Appellants submit that placement in rural institutions distant from their families, friends and communities for acts non-criminal in nature for which children alone are held responsible constitutes cruel and unusual punishment since it is degrading to their dignity as human beings, insidiously destructive to their humanity, arbitrary (some PINS are placed in training schools while others are not), unacceptable

to contemporary society and unnecessary, and therefore excessive. See Inmates v. Affleck, supra, at 1365.

It does not matter that placement of children who have committed no crimes in institutions located hundreds of miles from home and family does not constitute "primitive torture" or other patently physical harm. Nor does it matter that the punishment is not severe in the abstract. Robinson v. California, supra, at 666. Rather, there results a destruction of the child's status in society which is contrary to the "evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, supra, at 101; see, The President's Commission on Law Enforcement and Administration of Justice; Task Force Report: Juvenile Delinquency and Youth Crime; p. 360 (1969).

B.

Equal Protection

PINS are placed into training schools whereas neglected and abused children are not, even though those two classes of children are indistinguishable from each other, except that the PINS child is beyond the lawful control of his parent while the neglected or abused child has a parent who fails or neglects to

control or care for him. See F.C.A. §§713(b) and 1012 (e) and (f).* Because, based on this distinction, only PINS are subject to severe denial of fundamental constitutional rights inherent in New York State training school placement, Appellants are denied equal protection under the law.

When state discrimination between two classes results in denial of fundamental rights to one of them, the state must demonstrate that such denial is "necessary to promote a compelling state interest," Dunn v. Blumstein, 405 U.S. 330, 337 (1972). The right to "liberty" in the due process clause and the constitutional rights to associate and to travel, which Appellants allege are inherently and otherwise restricted in training schools, are fundamental rights to which the "compelling necessity" test applies. Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) (right to travel); Shelton v. Tucker, 364 U.S. 479 (1960) (right to associate); Moctezuma v. Malcolm, supra, at 5288, 5289 (right to liberty); Lessard v. Schmidt, 349 F.Supp. 1078 (E.D.Wis. 1972) rev'd on other grounds,

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* In fact, plaintiff Angel George has been adjudicated as both a neglected child and a PINS. (Doc. 1, ¶116; A. 42).

414 U.S. 473 (1973)(right to liberty under due process). See Matter of Kesselbrenner v. Anonymous, supra.

In Shapiro v. Thompson, 394 U.S. 618 (1969), a case which held that a durational residency requirement as a prerequisite to receipt of welfare was a denial of equal protection, the Supreme Court said, at 634:

> ...any classification which serves to penalize the exercises of that right [right to travel], unless shown to be necessary to promote a compelling governmental interest, is unconstitutional....

Hence, in the case at bar, Appellees may, for example, argue that the placement of PINS in training school is for the purpose of providing them with supervision and treatment. Assuming, arguendo, that this Court holds that such a purpose constitutes a compelling state interest, the equal protection clause further requires that the deprivation of fundamental rights inherent in training school placement is necessary to provide Appellants with supervision and treatment.

> The means must be "tailored" to serve their legitimate objectives (and) if there are other reasonable ways to achieve these goals with a lesser burden on the constitutionally protected activity a state may not choose the way of greater interference.

Dunn v. Blumstein, supra, at 342-343.

It is obvious that in order to receive treatment Appellants need not be closeted away hundreds of miles from their homes or subjected to the other inherent deprivations which training school placement perpetuates.

Moreover, Appellants' training school placement is not "necessary" under the equal protection clause if Appellees could satisfy their compelling state interest, as Appellants allege they can, without impinging on Appellants' fundamental rights to the extent that they do at present.

When fundamental rights are not in issue a state need only show a reasonable basis for statutory discrimination. Dandridge v. Williams, 397 U.S. 471 (1970).

Even assuming arguendo, that the court should find that Appellees need not demonstrate that placement in training school is necessary to promote a compelling state interest, Appellants' equal protection rights are still violated because there is no "reasonable basis" for the placement.* There can be

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* Appellants submit that although in their complaint they only alleged that there was no rational basis for such a distinction, the compelling state interest test is applicable.

no reasonable basis for the placement since Appellants need not be subjected to the restrictions inherent in training school placement in order to be treated.

Appellees' reliance on Martarella v. Kelley, supra, in the court below was misplaced. As stated earlier, Martarella involved only the temporary detention of PINS in Department of Social Services facilities which by statute could not hold the PINS for more than twenty days. Furthermore, there is no statutory authority for these temporary facilities to provide treatment. Id. at 577. In contrast, Appellants here challenge long-term placements which may last until the child reaches age 18.

Long-term placement in training school obviously constitutes a far more serious denial of fundamental rights than was involved in Martarella. The traditional "rational basis" test employed in Martarella which Appellants submit may not have been appropriate, is clearly inapplicable here. The court in Martarella, supra, at 602 limited its equal protection holding to PINS who are temporarily placed.

> There is a legal support for the dichotomy between the rights of short and long termers. The relevance of time as a factor in measuring constitutional rights

has been very recently recognized in another context by the Supreme Court. Jackson v. Indiana, 406 U.S. 715 (1972).

C.

Rights to Association and Travel

Placement in training schools located long distances from their homes, families and friends inherently restricts Appellants' right to freedom of travel and association. Additionally, Appellants contend that they are strictly confined within the training schools and rarely permitted to leave the cottage in which they reside. Home furloughs, granted by Appellees on grounds which Appellants allege are arbitrary and irrational, occur infrequently. Transportation costs are expensive and are paid by Appellants' families, who are, in many instances, public assistance recipients, and are often unable to visit their children because of such costs. (Docs. 9, 10; A. 71-72, 87-105).

Appellants are unable to associate with responsible people from their home communities, associating only with children and staff at the institutions. There is little or no contact with people from local communities. Even telephone calls have been strictly

and arbitrarily limited. (Docs. 9, 10; A. 71, 87-105, 142-145).

The right to travel is not expressly stated anywhere in the Constitution. Although its possible basis may be in the Commerce Clause, Article I, §8, the Fifth Amendment, or in the equal protection clause of the Fourteenth Amendment, the Supreme Court has, nevertheless found such a right to exist. Shapiro v. Thompson, supra. This right, grounded in the constitutional concept of personal liberty, may concern travel outside the country, Aptheker v. Secretary of State, 378 U.S. 500 (1964), or travel inside the country, Memorial Hospital v. Maricopa County, supra.

While the Supreme Court has never stated whether the right to travel includes intrastate as well as interstate travel, the Second Circuit has held that [i]t would be meaningless to describe the right to travel as a fundamental precept of personal liberty and not to acknowledge a conclative constitutional right to travel within a state." King v. New Rochelle Municipal Housing Authority, 442 F.2d 646, 648 (2d Cir. 1971).

The right to travel is closely associated with the right to freedom of association. United States v. Shaheen, 445 F.2d 6, 10 (7th Cir. 1971). Freedom of

association with others is a right secured by the First and Fourteenth Amendments. N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958). It is " a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." Shelton v. Tucker, supra, at 486. The form which the association takes need not be political in nature. It may be legal or social, Griswold v. Connecticut, 381 U.S. 479 (1965), and even involve association amongst members of a family, Mabra v. Schmidt, 356 F.Supp. 620 (W.D.Wis. 1973).

These two fundamental constitutional rights are intertwined with the equal protection and due process standards of the Fourteenth Amendment, Police Department of the City of Chicago v. Mosley, 408 U.S. 92, 101 (1972); Mabra v. Schmidt, supra, at 631, and their "limitation must be no greater than is necessary or essential for the protection of the particular governmental interest involved." Procunier v. Martinez, supra; Dunn v. Blumstein, supra. Appellants submit that their rights to associate and to travel are restricted to a greater extent than is essential to protect any legitimate state interest. See Point IIA and IIB, supra.

CONCLUSION

FOR THE FOREGOING REASONS THE LOWER COURT ORDER SHOULD BE VACATED AND THE CASE REMANDED FOR A PROPER CONSIDERATION OF ALL THE ISSUES RAISED IN THE COMPLAINT.

Dated: August 27, 1975
Brooklyn, New York

Respectfully submitted,

CHARLES SCHINITSKY, ESQ.
THE LEGAL AID SOCIETY

Attorneys for Appellants

189 Montague Street
Brooklyn, New York 11201
Tel. No. (212) 858-1300

GENE B. MECHANIC, ESQ.
MICHAEL J. DALE, ESQ.
Of Counsel

FAMILY COURT OF THE STATE OF NEW YORK
CITY OF NEW YORK COUNTY OF RICHMOND

In the Matter of GAYLOR ALEXANDER A Person Alleged to be in Need of Supervision, Respondent	Docket No. S-349/74

Appearances:

W. B. Richland, Corporation Counsel, Municipal Bldg., New York, N.Y.
By Gertrude Schwartz, Esq., Attorney for Comm. of Social Services
220 Church Street, New York, N.Y.
Milton L. Platt, Esq., 2 Lafayette Street, New York, N.Y.
Attorney for Department of Probation

Gary Glaser, Esq., Attorney for New York State Division for Youth,
2 World Trade Center, New York, N.Y. 10047

Michael J. Dale, of Counsel to Charles Schinitsky, Esq., Legal
Aid Society, 189 Montague Street, Brooklyn, N.Y. 11201
Attorney for Respondent

D E C I S I O N and O R D E R

M. Holt Meyer, Judge

Respondent by Order to Show Cause dated April 11, 1975 seeks an order pursuant to Family Court Act 761 and 762 vacating the Court's order of disposition of October 10, 1974, granting a new dispositional hearing and an order pursuant to 746 (b) requiring the Department of Probation to make available to the doctor chosen by Respondent's attorney any and all psychiatric, psychological and social work history in its possession.

Respondent's application is in all respects denied.

Respondent alleges no grounds sufficient to order a new dispositional hearing. There is no allegation by Respondent with respect to newly discovered matter or any evidence which the Court failed to consider in making its dispositional decision. In fact, the Respondent relies on alleged events subsequent to such hearing and seeks to show, according to the affidavit of Respondent's attorney, that Respondent was not afforded adequate and appropriate treatment by Division for Youth. Thus, while other remedies may exist, the Court finds that a new dispositional hearing based on findings, facts and reports dating back to times prior to October 10, 1974 wholly inappropriate.

M. HOLT MEYER

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DEPARTMENT OF LAW

AUG 27 1975

NEW YORK CITY OFFICE

ATTORNEY GENERAL